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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-464

MUNICIPAL DISTRIBUTORS GROUP, *Petitioner*

v.

FEDERAL POWER COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
STATUTE INVOLVED	3
QUESTIONS PRESENTED	3
STATEMENT	4
Proceedings in Southern Louisiana I	4
Proceedings in the Present Case Before the Commission	6
THE DECISION BELOW	9
REASONS FOR GRANTING THE WRIT	11
1. The Initial Refund-Reduction Figure of $225,000,000 Has No Record Support Whatsoever	14
2. The Contingent Reduction of the Remaining $150,000,000 of Refunds Was Discriminatory and Anti-Competitive	17
3. The Elimination of Refunds Ordered in an Earlier Docket Was Erroneous	18
4. The FPC Does Not Have Discretionary Power To Waive Refunds of Excessive Rates	22
CONCLUSION	25

CITATIONS

CASES:

Atlantic Refining v. Public Service Commission, 360 U.S. 378 (1959) 11, 23
Austral Oil Company v. FPC, 428 F2d 407, aff'd on rehearing, 444 F2d 125, cert. denied, 400 U.S. 950 ..... 5, 16, 20
FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944) .. 20, 21
FPC v. Sunray DX Oil Co., 391 U.S. 9 (1968) 20
Fidelity & Casualty Co. of New York v. Brightman, 53 F2d 161 (CA8, 1931) 24

Page

Hope Natural Gas Co. v. FPC, 196 F2d 803 (CA4, 1952) 21
Hugoton-Anadarko Area Rate Proceeding, Opinion No. 567, 42 FPC 726 (1969) 8
In Re Chicago, R. I. & P. Ry. Co., 162 F2d 606 (CA7, 1947) 24
Mason v. Fearson, 50 U.S. 248 (9 Howard), 13 L. Ed. 125 (1850) 24
McAndrews v. Belknap, 141 F2d 111 (CA6, 1944) 24
Michaelson v. United States ex rel. C., St. P., M, & O. R. Co., 266 U.S. 42, 69 L. Ed. 162 (1924) 24
Montana-Dakota Util. Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951) 20, 21
Pan American Petroleum Corporation v. FPC, 322 F2d 999 (CADC, 1963) 22
Permian Basin Area Rate Case, 390 U.S. 747 (1968) .. 16
Re Hugoton Anadarko Area Rate Case, 466 F2d 974 (CA9, 1972) 23
Southern Louisiana Area Rate Proceeding, Opinion No. 546, 40 FPC 530 (1968) 4
Southern Louisiana Area Rate Proceeding, Opinion No. 546A, 41 FPC 301 (1969) 5
State Corporation Commission of Kansas v. FPC, 215 F2d 176 (CA8, 1954) 20-21, 22
Supervisors of Rock Island Co. v. United States ex rel. State Bank, 71 U.S. 435, 18 L. Ed. 419 (1867) 23
Tacoma v. Taxpayer of Tacoma, 357 U.S. 320 (1958).. 22
Texas Gulf Coast Area Natural Gas Rate Case, CADC, No. 71-1828, August 24, 1973, — F2d — 11, 12, 13, 17, 25, 26
Union Texas Petroleum, et al., 32 FPC 254 (1964) 15
United States ex rel. Harrisman Nat. Bank v. Caplinger, 185 F2d 898 (CA8, 1927) 24
Wilson, et al. v. United States, 135 F2d 1005 (CA3, 1943) 24

STATUTES:

Natural Gas Act (52 Stat. 821-833, 15 USC 717-717w)

Section 4 3
Section 4(e) 5, 14, 23
Section 5 3
Section 7(e) 23
Section 19(b) 2, 3, 22

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The Municipal Distributors Group (MDG), consisting of Memphis Light, Gas & Water Division and the over 200 other members of the American Public Gas Association,[1] petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in the Southern Louisiana Area Rate Cases (*Placid Oil Co., et al.* v. *Federal Power Commission,* — F2d —).

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[1] The Municipal Distributors Group was created as an ad hoc group to make a joint presentation to the Federal Power Commission and the United States Court of Appeals in the Southern Louisiana Area Rate Cases. They own and operate municipal gas distribution systems.

OPINIONS BELOW

The initial Opinion of the Fifth Circuit Court of Appeals and its Opinion on Rehearing have been made Appendices to the Petition for Certiorari filed by Mobil Oil Corporation in No. 73-437, and by agreement between this petitioner, Mobil Oil Corporation and the Public Service Commission of the State of New York, and pursuant to permission of this Court, all three petitioners for certiorari will use the Mobil Oil Appendices.[2]

The initial Opinion of the Fifth Circuit Court of Appeals is found at Appendix C, pp. 5-61 and its Opinion on Rehearing at App. B, pp. 3-4. These Opinions are not yet reported.

The initial Opinion No. 598 of the Federal Power Commission and its Opinion on Rehearing No. 598-A are reported, respectively, at 46 FPC 86 and 46 FPC 633. These Opinions have been provided to the Court by Mobil Oil Corporation in Part I of Volume 2 of the Joint Appendix[3] in the court below.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on April 16, 1973 (App. A, p. 1), and the Petitions for Rehearing were denied June 11, 1973 (App. B, p. 3). By Order of June 20, 1973, Mr. Justice Powell extended the time for filing the Petition for Writ of Certiorari to September 10, 1973. The jurisdiction of this Court is invoked under 28 USC 1254(c) and § 19(b) of the Natural Gas Act, 15 USC 717r (b).

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[2] References to the Appendices will be "App. —".

[3] References to the Joint Appendix will be "Jt. App. ——."

STATUTE INVOLVED

The Natural Gas Act, §§ 4, 5, 19(b), 52 STAT. 821, 15 USC §§ 717c, 717d, 717r, is set forth in App. D, pp. 65-69.

QUESTIONS PRESENTED

1. Where the Federal Power Commission, in the first Southern Louisiana Area Rate Case (Docket No. AR 61-2), had ordered refunds of excessive rates charged by natural gas producers prior to October 1, 1968, which refunds amounted to approximately $375,000,000, was the Fifth Circuit Court of Appeals in error in holding that the Commission acted within its powers in the instant Docket No. AR 69-1, when it approved a settlement proposal, not agreed to by all of the parties, and provided

(a) for an immediate reduction of the amount of the previously-ordered refunds by an amount of $225,000,000, and

(b) for the "work-off" of the remaining $150,000,000 of refunds by giving credits against individual producer refund obligations for natural gas subsequently committed to interstate commerce by such producers from the Southern Louisiana area,

where there was no statutory authority therefor, and where, assuming such statutory authority, there was no cost or other evidence whatsoever to support the figure of $225,000,000 for the immediate reduction in refunds, and where the provision for working off the balance of the refunds gave the greatest benefits to producers who had charged the highest rates in the past, and discriminated against producers which had charged lower rates in the past and against new producer entrants in the Southern Louisiana area who had no pre-1968 production in that area?

2. Did the Fifth Circuit Court of Appeals err in holding that the Commission acted within its powers when it retroactively revised the refund order which it had previously issued in Docket No. AR61-2?

3. Did the Fifth Circuit Court of Appeals err in approving the Commission's provision for contingent escalation in rates for flowing gas, where the producers which earned the rate escalation by dedication of new reserves would not be the same producers who benefited from the consequent escalation in rates, and where there was no cost or other basis for such escalations?

STATEMENT

Proceedings in Southern Louisiana I

On September 28, 1968, the Federal Power Commission issued its Opinion No. 546 and accompanying Order (40 FPC 530) in the first Southern Louisiana Area Rate Case. That Opinion, which was the culmination of seven years of investigation and litigation, established a composite national average cost per Mcf of gas which had been committed to contract prior to October 1, 1968 of 18.36¢ per Mcf, and found that the national average cost of new gas in the Southern Louisiana rate area was 18.80¢ per Mcf.

Upon these basic findings, the Commission established a price of 18.5¢ per Mcf for all natural gas subject to its jurisdiction in the Southern Louisiana area, which was committed to contract prior to 1961; 19.5¢ per Mcf for gas sold under contracts dated January 1, 1961 to September 30, 1968; 20¢ per Mcf for gas sold under contracts dated October 1, 1968 and thereafter. Gas not subject to the Louisiana severance tax was priced 1.5¢ per Mcf below the above figures.

Pursuant to the refund provisions of Section 4(e) of the Natural Gas Act (15 USC § 717c), the Commission required the respondent producers to refund all rates in excess of the just and reasonable level for flowing gas, which had been collected by the producers subject to refund.

On Petitions to Rehear, the Commission issued its Opinion No. 546-A on March 20, 1969 (41 FPC 301) in which it held that, while the petitioners for rehearing had made no showing that the prices therein established would be inadequate to bring forth the optimum degree of industry effort to meet increasing demands for natural gas, nevertheless, the vital importance of future additional gas supply in the off-shore Louisiana area warranted the immediate commencement of future proceedings looking toward a possible upward revision of the price ceiling for new off-shore gas.

Opinion Nos. 546 and 546-A were appealed to the United States Court of Appeals for the Fifth Circuit, where the Commission was in all respect affirmed. *Austral Oil Company* v. *FPC,* 428 F2d 407, *aff'd on rehearing,* 444 F2d 125, *cert. denied,* 400 U.S. 950, While emphasizing that its judgment was an affirmance and not a remand, the Fifth Circuit Court of Appeals, on Petitions for Rehearing purported to grant to the Commission authority "to reopen *any* part of its order that circumstances require to be reopened . . . ." The court below made it part of the remedy "that the authority of the Commission to reopen any part of its orders, including those affecting revenues from gas already delivered, is left intact." (444 F2d at 126).

Proceedings in the Present Case Before the Commission

The instant proceeding was initiated by the Commission on March 20, 1969 at Docket No. AR69-1 (41 FPC 378), where the Commission initiated an investigation to determine whether the ceiling rates prescribed in Opinion Nos. 546 and 546-A for gas in the off-shore federal domain of the Southern Louisiana area should be raised. Pursuant to a large number of petitions, motions and replies, the Commission on December 15, 1969 enlarged the proceeding to include the entire geographical area of Southern Louisiana, onshore as well as off-shore, and to provide for a review of the just and reasonable rates for all vintages of gas produced therefrom. 42 FPC 1110.

Subsequently, a settlement conference was convened, and on November 6, 1970 the United Distribution Companies (UDC) consisting of 32 major privately-owned distribution companies, participating as a group, submitted a settlement proposal to the Commission. The Commission ordered it made a part of the record in the case. (Jt. App. 589) The proposal was subscribed to by the Associated Gas Distributors (AGD), another group of privately-owned distribution companies, and by all of the interstate pipelines and 46 natural gas producers. It was opposed by Mobil Oil Corporation, Amoco Production Company, the Public Service Commission of New York and MDG, petitioner herein. After making the settlement a part of the record in the case, the Commission on its own motion consolidated the instant docket with Docket No. AR61-2 (the first Southern Louisiana Area Rate Case), reopened the latter docket, and received evidence for and against the settlement proposal.

After presentation of evidence, and waiver of Initial Decision by the Hearing Examiner, the Commission issued its Opinion No. 598 and accompanying Order on July 16, 1971 accepting the settlement *in toto*.

The settlement provided the following rates:

For gas committed to contracts since October 1, 1968 (new gas) a rate of 26¢ per Mcf, both within and without the Louisiana taxing jurisdiction, with an automatic increase to 27¢ on October 1, 1974. This provided an immediate increase of 30% for gas subject to the Louisiana tax, and an increase of 40% for offshore gas, above the rates for new gas allowed in Opinion No. 546.

For gas committed to contract before October 1, 1968 (flowing gas):

Onshore (taxed)	22.375 cents
Offshore (untaxed)	21.375 cents

plus an automatic price escalation of .5 cents per Mcf on October 1, 1973. These rates were made subject to contingent escalation as follows:

When new gas reserves are committed to jurisdictional sales in Southern Louisiana before October 1, 1977, by whomever committed, the rates for all flowing gas will escalate at such time as follows:

at 7½ trillion cubic feet	.5 cents
at 11¼ trillion cubic feet	.5 cents
at 15 trillion cubic feet	.5 cents
Total	1.5 cents

The provisions made in the first Southern Louisiana Area Rate Case for refunds of excessive rates were

drastically modified. In lieu of the refunds of approximately $375,000,000 required by Opinion No. 546, which consisted of all revenues which had been collected in excess of the rates there found to be just and reasonable, the refund obligation was unconditionally reduced to $150,000,000 by retroactively increasing the rates prescribed as just and reasonable in Opinion No. 546. The retroactive increases were as follows (Jt. App. 652-65):

Prior to January 1, 1965:

The rates were retroactively increased from 19.5 cents per Mcf to 20.625 cents onshore, and from 18 cents to 19.625 cents offshore, and refunds associated with such sales of gas were reduced by the difference between such rates.

January 1, 1965-September 30, 1968:

The rates were retroactively increased from 19.5 cents per Mcf to 21.25 cents onshore, and from 18 cents per Mcf to 20.25 cents offshore, and refunds associated with such sales of gas were reduced by the difference between such rates.

September 30, 1968-January 1, 1971:

Refunds were retroactively reduced for gas sales in this period to 30.5% of the difference between rates in effect on October 1, 1970 and those fixed in Opinion No. 546 and 546-A (as modified by Opinion No. 567).[4]

After January 1, 1971:

Refunds were limited on all rates in excess of ceilings established in Docket No. AR69-1. (Jt. App. 652-653)

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[4] Opinion No. 567 determined that gas from newly discovered reservoirs on already-committed leases should enjoy the higher price in effect upon discovery, and not the price at the date of the lease of the contract. 42 FPC 726 (1969).

The $150,000,000 of reduced refunds were subject to further reduction and entire elimination by refund "work-off" credits as follows:

Any company with a refund obligation to any natural gas pipeline company was allowed to reduce (or eliminate entirely) the refund obligation by one cent for each Mcf of new gas reserves committed in Southern Louisiana to a jurisdictional (interstate) market between November 1, 1970 and October 1, 1977, subject to extension of time within which the obligation could be reduced. (Jt. App. 654, 666, 699).

THE DECISION BELOW

The Fifth Circuit Court of Appeals sustained the Commission on all points. It affirmed a rate of 26¢ per Mcf for all gas, both on-shore and off-shore, committed to contract after October 1, 1968. The court below also approved the rates established for flowing gas committed to contract prior to October 1, 1968, although it recognized that the new rate required flowing gas to "bear a portion of the burden for the exploration and production of new gas in the future," (App. 32), in addition to covering all of the costs and an adequate return on the flowing gas itself.

With respect to the refunds, the court below sustained the power of the Commission to reduce, and to provide for the complete elimination of, the refunds which had been ordered in its Opinion No. 546. As to the amounts thereof, the court below affirmed the reduction to $150,000,000 on the ground that there would have been an even greater refund reduction if the Commission had applied to the Opinion No. 546 re-

funds the flowing gas rates established in Opinion No. 598 (App. 43). Also, the Court held that—

> FPC does not *have* to order refunds under the terms of the Natural Gas Act. It *may* do so. (App. 43-44)

To the objection that the reduction in refund obligation benefited some producers more than others, the court below recognized that there was discrimination but held—

> We will not reject an administrative decision merely because one producer's piece of cake is iced and another's is not. (App. 45).

The court below affirmed the refund credit provisions of the Commission-approved settlement on the ground that the "FPC's statutory authority to order refunds is clearly discretionary," and that it "may tailor its refund orders to the particular needs of the industry in a given area." (App. 47, 48).

The Order affirmed the provisions for both automatic and contingent escalations in flowing gas rates on the ground that they were "a proper subject for the exercise of administrative discretion and clearly fall within that 'zone of reasonableness' which we allow FPC on review." (App. 50). To the complaint of certain producers that the escalation provisions made it competitively disadvantageous for them to commit new reserves to the jurisdictional market since such commitment would operate only to the benefit of their competitors, the reply of the court below was that "half a loaf is better than no loaf at all", and that the FPC had found that the provisions would provide incentive for some producers. (App. 50-51).

REASONS FOR GRANTING THE WRIT

I.

The Fifth Circuit Court of Appeals has rendered a decision in this case of vital national importance which is in direct conflict with the decision of the United States Court of Appeals for the District of Columbia Circuit in *Texas Gulf Coast Area Natural Gas Rate Case,* No. 71-1828 CADC, August 24, 1973, — F2d —.

A Commission area rate decision in the *Texas Gulf Coast* case, which was very similar to, and patterned upon, the *Southern Louisiana* case, was reversed by the United States Court of Appeals for the District of Columbia Circuit whose reasoning is in direct conflict with that of the Fifth Circuit.

The decision of the court below is also in conflict with a consistent line of decisions of this Court that hold that the Commission has no retroactive rate-making powers. The ruling of the court below jeopardizes the regulatory scheme enacted by Congress "So framed as to afford consumers a complete, permanent, and effective bond of protection from excessive rates and charges." *Atlantic Refining* v. *Public Service Commission,* 360 U.S. 378, 388 (1959).

In the *Texas Gulf Coast* case, the D. C. Circuit Court of Appeals considered provisions for contingent escalations of flowing gas rates which were quite similar to the provisions in the instant case, and remarked that the Commission, in its brief in that Court, "lean(s) heavily on the Southern Louisiana II Opinion to support the incentive provisions adopted here." (Slip Op. 49) The contingent escalation provisions were found to have the following defects:

> The consumers who would shoulder the costs of escalations are not the same as the consumers who

will be receiving the supplies from new findings of gas supposedly resulting from the incentive provided by the contingent escalations; (Slip Op., p. 57)

The flowing gas increase was not necessary to obtain exploration funds, and the prices for new gas had already been increased to assure exploration capital; (Id.)

There is no assurance that the money generated from the increased price of flowing gas will be used in new exploration activities—that determination will depend upon the estimate of the earnings from such activities; (Slip Op., p. 59)

No semblance of analysis was given by the Commission of the consequences of the contingent escalations upon the industry structure, nor is reasonable consideration given to the alternative of an increase in the new gas price; (Slip Op., p. 61)

The excuse that area rate determination is still in an experimental stage cannot substitute for reasoned analysis when the rate structure raises a serious problem of discrimination; (Slip Op., p. 62)

The contingent escalation provision is discriminatory against producers with less or no flowing gas; (Slip Op., pp. 62-65)

The provision discriminates against customers of flowing-gas producers, and such discrimination must be evaluated and weighed against other possible regulatory approaches. (Slip Op., pp. 65-66)

The provisions for the work-off of refunds in the *Texas Gulf Coast* case was again patterned upon the similar provision in the instant case. The D.C. Circuit Court of Appeals in the *Texas Gulf Coast* case found that the provision gave to sellers charging higher prices in the past an advantage and a preference over pro-

ducers who had lower potential refund liabilities, or who had made cash refunds discharging their liabilities; and that "(t)his is a happenstance and a capricious preference which is not accompanied by any justification of reasonableness." (Slip Op., p. 66) The D.C. Circuit found that, to the extent the Commission relieved producers from refund obligations

> . . . it lets stand, without redress, past violations, and it promotes unjust discrimination and anticompetitive effects. (Slip Op., p. 69)

In *Texas Gulf Coast,* the majority also rejected the base area rates adopted by the Commission on the grounds that they were not adequately supported by the record. The D.C. Circuit Court said:

> The defect that we find in the Commission's order is, essentially, a lack of information, a lack so pervasive that, even within the narrow limits of our judicial review function, we are unable to say whether the rates announced in this order are reasonable or whether they comport with the requirements of the Natural Gas Act. (Slip Op., p. 86)

II.

The Fifth Circuit Court of Appeals has approved a Federal Power Commission order which deprives consumers of more than $375,000,000 [5] of refunds of rates collected by natural gas producers in excess of the just and reasonable rates required by the Natural Gas Act.

This was error for the following reasons:

There was no evidence whatsoever to support the initial reduction figure of $225,000,000 in refunds. The

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[5] The $375,000,000 figure is the amount of refund due as of September, 1968. The full amount, including interest, is now much larger.

figure was arrived at solely by negotiation between certain of the parties to the cause;

The basis for crediting the $150,000,000 of remaining refunds against commitments of new gas was discriminatory and anti-competitive on its face;

The elimination of the $375,000,000 refund ordered by Opinion No. 546 represented an unlawful retroactive increase in the rates found to be just and reasonable on that record, without any re-examination of the findings made on that record, and without any finding of any increase in cost of the pre-1968 gas involved in that record.

The Commission has a duty, under the Natural Gas Act, to require refunds where a natural gas company has charged unlawful rates which have been placed in effect subject to refund, pursuant to Section 4(e) of the Act.

1. The Initial Refund-Reduction Figure of $225,000,000 Has No Record Support Whatsoever.

The figure of $225,000,000 [6] representing the amount by which the Commission immediately reduced its previously-ordered refunds, has no evidentiary support whatsoever in the record. It was the product of negotiations between the producers and those pipelines and privately-owned distributors who had no stake in the refunds, because of the obligations to flow them through to their customers. Those negotiations picked out of thin air a reduced refund figure of $150,000,000, and afterwards constructed a unique formula of vintaged

[6] Like the total figure of $375,000,000, the present $225,000,000 would be substantially greater at the present time.

rates which would produce precisely that result. The formula was:

> Prior to January 1, 1965, refund all rates in excess of 20.625¢ onshore and 19.625¢ offshore;
>
> January 1, 1965 to September 30, 1968, refund all rates in excess of 21.25¢ onshore and 20.25¢ offshore;
>
> October 1, 1968 to January 1, 1971 refund 30.5% of the difference between whatever rates were in effect prior to October 1, 1970 and the rates fixed in Opinion 564 and 564-A (modified by Opinion No. 567);
>
> After January, 1971, refund all rates in excess of those set by Opinion No. 598.

This formula was created entirely by the negotiators and their computers, for the sole purpose of arriving at a predetermined total refund of $150,000,000. There is not a shred of evidence to support, nor a single finding to justify, any figure in the formula.[7]

This unconditional forgiveness of refunds represented a non-cost addition to the producers' rates. It

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[7] The Commission by footnote (Jt. App. 652) relates the pre-1965 rates to its consolidated *Union Texas Petroleum* cases, 32 FPC 254, 952 (1964). These were not rate cases, but certificate cases. The "in-line" rates there established were not those above shown, but 18.5 cents offshore and 20 cents onshore.

In another footnote (Jt. App. 653) the Commission relates the January 1, 1965-September 30, 1968 rates to the Statement of General Policy 61-1, 26 FPC 661 (1967). This was also not a rate case. The offshore rate there fixed was not 20.25 cents, as adopted here, but 19.5 cents.

The computation for the period October 1, 1968-January 1, 1971 was arrived at solely to make up the balance of the negotiated refund figure of $150,000,000, and was subject to whatever modification was necessary to reach that pre-arranged figure. (Jt. App. 662).

clearly violated this Court's requirement in the *Permian Basin Area Rate Case,* 390 U.S. 747, 791, that each of the order's essential elements must be supported by substantial evidence. It violated the Fifth Circuit's own ruling in *Austral* (Southern Louisiana I) that non-cost factors in rates are allowable only "when clearly labeled and justified on the basis of substantial evidence on the record as a whole." 428 F.2d at 441.

In the absence of any evidence, analysis, or rationale to support the reduction from $375,000,000 to $150,000,000, the action amounts to the sanctioning of price-fixing on a grand scale by negotiators consisting, on the one side, of the bulk of the producing industry in Southern Louisiana, which controlled virtually the entire supply of gas, and on the other, of pipelines and privately-owned distributors who desperately needed gas and who had no interest at all in the refunds, because those distributors would be required by their respective regulatory commissions, in virtually all cases, to pass them along to their customers *in toto.* A more unequal bargaining position is difficult to conceive, or one less likely to protect the interests of the consumer, whose protection is the prime purpose of the Natural Gas Act.

The Fifth Circuit Court of Appeals completely overlooked these facts when it relied upon the "wide support" for the settlement and the fact that it included distributors representing a substantial portion of the national sales of gas. (App. 21). It even paradoxically took comfort from the fact that the settlement was vigorously opposed by the Municipal Distributors Group and the Public Service Commission of New York, concluding that this was evidence of its "objectivity" and "consideration, pro and con, of all sides of

the problem." (App. 21) The court below failed to note that those two objectors were the only active intervenors whose first loyalty was to consumers, rather than to stockholders.

2. The Contingent Reduction of the Remaining $150,000,000 of Refunds Was Discriminatory and Anti-Competitive.

In addition to the error committed in the Commission's arbitrary reduction of the refunds ordered in the prior docket, the provisions for a "work-off" of the remaining $150,000,000 of refunds in that docket was discriminatory against other producers, pipelines and consumers. The provisions approved by the Commission and Fifth Circuit Court of Appeals in this case were for all practical purposes identical in nature to those disapproved by the Court of Appeals for the District of Columbia Circuit in the *Texas Gulf Coast* case. (Slip Op., pp. 66-69).

The refund credit is 1¢ for each Mcf of reserves committed by a producer. However, the producer may pay off as much as 50% of his obligation to one pipeline by committing new reserves to a different pipeline. (Jt. App. 695-699). The comment of the Court of Appeals for the District of Columbia Circuit is squarely in point:

> The work-off provision gives an advantage to sellers charging high prices in the past, particularly as a result of section 4(e) filings which resulted in rates higher than those specified in the permanent certificate, for it lets them work off their refund obligation by dedications, giving them a preference over producers who had a lower potential refund liability or who had made cash refunds discharging their liability. (Slip. Op., p. 66).

The benefits accrue only to producers already in Southern Louisiana, and give them a competitive price advantage over new producer entrants as well as over those producers who had charged the lower rates in past years. The Commission recognized that the refund "work-off" provision would create inequities and would work to the comparative disadvantage of some producers, as the Court below also recognized. (App. 45).

But the court below was willing to affirm it because "FPC concluded that the overall structure would stimulate greater exploration and development and have a general pro-competitive effect." (Id.) To the argument that the $150,000,000 figure was chosen simply by industry negotiations with no evidentiary basis whatsoever, the court below replied that the stipulated refunds would have been even lower had they been computed on the "just and reasonable" rate established for flowing-gas by Opinion No. 598. (App. 43). This answer emphasizes the total lack of rationale supporting the $150,000,000 figure and ignores the unlawful retroactive ratemaking which is involved in the application of the AR69-1 rates to the Docket No. AR61-2 refunds.

3. The Elimination of Refunds Ordered in an Earlier Docket Was Erroneous.

The Fifth Circuit court of appeals erred on still another ground when it approved the Commission's modification of its earlier refund order. When the Commission reduced the refunds which it had ordered in Opinion No. 546, and provided for the work-off of the balance, there had been no reexamination of the evidence in that docket whatsoever. The Commission's action with respect to the Opinion No. 546 refunds was

predicated entirely upon considerations stemming from Docket No. AR69-1. There was no evidence in the latter docket to indicate that there had been any actual increase in the costs associated with pre-1968 flowing gas, since the establishment of those costs in Docket No. AR61-2. When the MDG raised this point, the Commission's reply was to avoid reply, saying:

> To argue that there has been no increase in the unit cost of flowing gas since the AR61-2 test year of 1960, really begs the question. (Jt. App. 645).

It is clear, therefore, that the elimination of refunds in Opinion and Order No. 598 constitutes a retroactive increase in the rates which had been established for pre-1968 gas and represents the modification of a final, judicially affirmed order in the earlier case.

In affirming the Commission's action with respect to refunds, the Fifth Circuit pointed out that

> the stipulated refund amounts [i.e. the $150,000,000 balance which remained after eliminating $225,000,000] are more beneficial to their [consumers'] particular interests than would be a refund order based on the 'just and reasonable' rate established for flowing gas by Op: 598 (App., p. 43; material in brackets supplied).

There is no question but that the Commission had the power, in Docket No. AR69-1, to recompute flowing-gas costs and to increase flowing-gas rates *prospectively.* It had no power, however, to increase rates for pre-October 1, 1968 gas *retroactively,* which is precisely what it did when it drastically reduced the refunds due to customers by virtue of the Order in Opinion No. 598.

The Commission purported to act in this area under an Order of the Fifth Circuit in the first Southern

Louisiana Area Rate Case which authorized it to "reopen any part of its orders [in Docket No. AR61-2], including those affecting revenues from gas already delivered . . ." and to "make retrospective as well as prospective adjustments in this case if it finds it in the public interest to do so." *Austral Oil Co.* v. *FPC*, 444 F2d at 126-127, (quoted at App. 42). This order of the Court of Appeals did not purport to authorize the Commission to act without evidentiary support. The order was not a *carte blanche* to the Commission to modify retroactively its findings and order in Opinion No. 546 without further review of the record in that docket. Since the order for refunds in Opinion No. 546 was based upon evidence and findings from the record in that docket, any change affecting the same period of time must be justified by a reconsideration of the same record. To make a retroactive change in an order in Docket No. AR61-2, by reason of evidence submitted in a later docket would be a clear case of retroactive rate-making.

Such retroactive rate-making was not authorized by the terms of the *Austral* opinion. Even if it had been, the court could not have lawfully authorized such action by the Commission.

This Court has unequivocally declared that the Commission has no retroactive rate-making powers and that neither the Commission nor the court has the power to award reparations. *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944); *Montana-Dakota Util. Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 254 (1951), and see 341 U.S. at 258 for concurrence of the dissenting opinion on this point; *FPC* v. *Sunray DX Oil Co.*, 391 U.S. 9 (1968). To the same effect are decisions of the circuit courts of appeals. *State Corpora-*

tion Commission of Kansas v. *FPC*, 215 F2d 176, 183 (CA8, 1954); *Hope Natural Gas Co.* v. *FPC*, 196 F2d 803, 805 (CA 4, 1952).

In *FPC* v. *Hope Natural Gas Co.*, 320 U.S. at 618, this Court said:

> It is conceded that under the Act the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those 'to be thereafter observed and in force.'

In *Montana-Dakota, supra,* this Court was unanimous on the point that the Commission has no power to grant reparations and that the Commission's rate-making authority was only to grant prospective rate relief. [Cf. 341 U.S. at 254 and 258]. On these points as to which there was no dissent the dissenting opinion said (341 U.S. at 257-58):

> We face at the outset the contention that this section confers on the Federal Power Commission authority to award reparations for unreasonable rates collected in the past. Federal railroad rate legislation gave such a power to the Interstate Commerce Commission . . . But it was not given to the Federal Power Commission. It was withheld deliberately. See S. Rep. No. 621, 74th Cong. 1st Sess. 20. Wholesale consumers of electric energy were apparently considered, as a rule, adequately protected by the provisions of the Act authorizing the Commission to grant prospective relief and, in certain circumstances, to order refunding of sums accumulated during the pendency of rate proceedings . . . Despite the unqualified statutory declaration that unreasonable rates are unlawful, we think it clear that Congress did not intend either the court or Commission to have the power to award reparations on the ground that a

> properly filed rate or charge has in fact been unreasonablely high or low . . ." [8]

In *State Corporation Commission of Kansas, supra,* the Eighth Circuit held that (215 F2d at 183, 184):

> Under Section 4(e) the Commission may order a refund with interest of rates or charges which it has decided not to be justified but its power to fix rates is prospective only and those it fixes are applicable to the future.
>
> * * *
>
> . . . the Commission's legislative fixing of rates must necessarily relate to the future and the Commission lacks power to grant reparation where a rate has proved on application to be confiscatory.

The corollary of the above principle is the rule that, under Section 19(b) of the Natural Gas Act (15 U.S.C. 717r), the Commission's power to revise an order remains with the Commission only until such time as the record on review has been filed with the court of appeals. *Pan American Petroleum Corporation* v. *FPC,* 322 F2d 999, 1004 (CADC 1963). Thereafter, when affirmed on appeal, the Commission has no authority to modify the order. *Tacoma* v. *Taxpayer of Tacoma,* 357 U.S. 320, 336 (1958); *State Corporation Commission of Kansas* v. *FPC, supra,* 215 F2d at 184.

4. The FPC Does Not Have Discretionary Power To Waive Refunds of Excessive Rates.

Finally, the Court of Appeals approved this aspect of the Commission's order on the basis that "FPC does not *have* to order refunds under the terms of the Natural Gas Act. It *may* do so." (App. 43-44). The

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[8] Although the Court was discussing the rate-making provisions of the Power Act, the decision applies with equal force to virtually identical rate-making provisions of the Gas Act.

cases cited by the Court in support of this proposition do not support it.[9]

The law is that the Commission does not have the discretion to refuse to order refunds of amounts charged by regulated companies pursuant to unlawful rates. The intent of the Natural Gas Act is "to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." *Atlantic Refining* v. *Public Service Commission,* 360 U.S. 378, 388 (1959). This cannot be done where the seller is allowed to retain excessive rates and charges placed in effect subject to refund.

This Court, in *Supervisors of Rock Island Co.* v. *United States ex rel. State Bank,* 71 U.S. 435, 18 L.Ed. 419 at 423 (1867) construed a statute providing that a county "*may* if determined advisable" levy a tax, as *requiring* the levy by the county authorities. The court said:

> The conclusion to be deduced from the authorities is, that where power is given to public officers, in the language of the act before us, or in equivalent language—whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is in fact pre-

[9] The decisions cited by the court below to support this statement, with the exception of the decision of the Ninth Circuit in *Re Hugoton Anadarko Area Rate Case,* 466 F2d 974 (1972), were not rate cases and did not present the question of Commission discretion respecting refunds under Section 4(e) of the Natural Gas Act. With the exception of the *Hugoton* case, the cases relied on by the Fifth Circuit dealt with the Commission's discretion to impose refund conditions in certificate cases under Section 7(e) of the Act and the licensing power of the Commission under Part I of the Federal Power Act. The Ninth Circuit in *Hugoton* relied on these same cases for its unfounded conclusion respecting the Commission's authority under Section 4(e) of the Gas Act.

> emptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depository to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless.

Again in *Mason* v. *Fearson,* 50 U.S. 248 (9 Howard), 13 L.Ed 125 at 130 (1850), this Court recognized that

> "Where a statute directs the doing of a thing for the sake of justice, or the public good, the word 'may' is same as the word 'shall' . . . ."

The Court went on to say

> Without going into more details, these cases fully sustain the doctrine, that what a public corporation or officer is empowered to do for others, and it is beneficial to them to have done, the law holds he ought to do. The power is conferred for their benefit not his; and the intent of the legislature, which is the test in these cases, seems under such circumstances to have been "to impose a positive and absolute duty." But, under other circumstances where the act to be done affects no third persons, and is not clearly beneficial to them or the public, the words "may" do an act, or it is "lawful" to do it do not mean "must" . . . .[10]

III.

The approved settlement agreement provides for an automatic escalation of one-half cent in the rates for

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[10] To the same effect see *Michaelson* v. *United States ex rel. C., St. P., M, & O.R. Co.,* 266 U.S. 42 at 70, 69 LEd. 162 (1924); *In Re Chicago, R.I.&P. Ry. Co.,* 162 F2d 606 at 611 (CA7, 1947); *McAndrews* v. *Belknap* (CA6, 1944) 141 F2d 111; *Wilson, et al.,* v. *United States,* 135 F2d 1005 at 1009 (CA3, 1943); *Fidelity & Casualty Co. of New York* v. *Brightman,* 53 F2d 161 (CA8, 1931); *United States ex rel. Harrisman Nat. Bank* v. *Caplinger,* 18 F2d 898 (CA8, 1927).

flowing gas on October 1, 1973 (Jt. App. 680) and for three contingent half-cent escalations, as specified volumes of reserves are committed to jurisdictional sales in the future. (Jt. App. 681).

The reserves which are committed for the purpose of refund credits do not count toward the rate escalations. This raises the problem, as recognized by the Fifth Circuit Court of Appeals, that for producers with small or no refund obligations, "it is competitively disadvantageous for them to commit new reserves to the jurisdictional market." (App. 50). Their exploratory efforts contribute to raising their competitors' rates, but the efforts of a refund-obligated competitor may benefit no one but himself. The Fifth Circuit Court of Appeals had no answer to this objection, except that "half a loaf is better than no loaf at all," and it would encourage *some* of the producers to commit new reserves to the interstate market. (App. 50)

The contingent escalation provision in this case is substantially identical to, and was the model for, the one in *Texas Gulf Coast,* where the D.C. Circuit Court of Appeals held it invalid for each of the several reasons set forth hereinabove.

As noted by the D.C. Circuit Court of Appeals, the provision is discriminatory, anti-competitive in its effects, and totally unsupported by any cost or other justification.

CONCLUSION

The precedent established by the action of the Commission and the Opinion of the Court of Appeals for the Fifth Circuit is an extremely dangerous one and undermines the regulatory scheme of the Act. Without evidentiary support, and without adequate analysis, the

court below has approved a result arrived at on the basis of negotiation and in an atmosphere of crisis, rather than by the application of long-accepted rate-making principles. Regulation by negotiation among members of the industry will never provide adequate protection to consumers, and especially not under circumstances where the demand for gas greatly exceeds the supply. The reason why the industry members so easily disposed of $375,000,000 of refunds by agreement is very clear; they were dealing with other people's money. Virtually the entire amount of any refunds collectible by the pipelines and the distributors would have to be passed along to their customers. It is not surprising that the end result is that the consumer-customers end up with nothing.

In *Texas Gulf Coast,* the D.C. Circuit Court said: "It is not in the public interest to lend the forms and trappings of the administrative process (including the element of judicial review) to what is in substance an abdication to the producers." (Slip. Op. 70-71) That describes precisely the result in the instant case.

WHEREFORE, petitioners respectfully submit that a Writ of Certiorari should be granted.

Respectfully submitted,

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